Supreme Court, U.S.
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No. 02-122

IN THE

Supreme Court of the United States

KLOSTER CRUISE LINES N.V., d/b/a
NORWEGIAN CRUISE LINE,

Petitioner,

v.

PATRICIA ESPINET, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE CASE

Petitioner Kloster Cruise Lines, N.V. d/b/a Norwegian Cruise Line's ("Norwegian") statement of the case in its Petition for Writ of Certiorari (the "Petition) is misleading and contains facts which are irrelevant.

Norwegian seeks review of an interlocutory decision by a state appellate court which reversed a trial court's denial of class certification in a class action filed in 1996 in the Circuit Court of Miami-Dade County, Florida (the "Action"). The Action seeks damages and other relief on behalf of Norwegian cruise passengers based on deceptive statements contained in Norwegian's marketing and sales materials concerning its billing and collection of "port charges" or "port taxes" (hereinafter "Port Charges"). Substantially similar lawsuits were filed against other cruise lines, including Carnival Cruise Lines ("Carnival") and Costa Cruise Lines, N.V. ("Costa"). Although the interlocutory appellate decision giving rise to Norwegian's petition refers to three consolidated appeals, only the Action against Norwegian is the subject of this Petition.[1]

Plaintiffs-Respondents (hereinafter "plaintiffs" or ("Respondents") are U.S. residents who paid Port Charges to Norwegian. Their central allegation is that the Port Charges billed and collected by Norwegian from its customers greatly exceeded the amounts paid by Norwegian to port authorities. Instead, plaintiffs allege that much of the revenue collected under the guise of Port Charges was actually retained by Norwegian for its own use and benefit, representing an

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1. The class action case against Carnival was settled following issuance of the decision at issue. The class action case against Costa remains pending in the trial court. Costa did not seek further review following issuance of the instant decision.

improper hidden profit in light of Norwegian's advertised "all-inclusive" cruise fares.

The Action asserts three causes of action under Florida's consumer protection statute, the Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq.* ("FDUPTA"), and a common law cause of action for unjust enrichment. The FDUPTA claims seek declaratory and injunctive relief and recovery of damages based on Norwegian's deceptive and unfair conduct. The common law claim seeks damages only.

On February 6, 1998, the trial court denied Norwegian's motion to dismiss the complaint based, in part, on Norwegian's assertion that FDUPTA was inconsistent with admiralty law.

On March 8, 1999, the trial court denied plaintiffs' motions for class certification. An interlocutory appeal ensued pursuant to Fla. R. App. P. 9.130(a)(6). On February 2, 2000, the Florida Third District Court of Appeal ("Third District") reversed and remanded the case to the trial court with directions to certify the Action as a class action.

Norwegian sought rehearing and rehearing *en banc* before the Third District which was denied on May 31, 2000. Norwegian then sought discretionary review by the Florida Supreme Court which was denied on April 19, 2002.[2] Norwegian's Petition to this Court followed.[3]

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2. Carnival likewise sought discretionary review by the Florida Supreme Court following denial of rehearing by the Third District. The class action settlement with Carnival was reached and approved while the petition for discretionary review was pending, at which time Carnival voluntarily dismissed its petition.

3. Further proceedings in the trial court against Norwegian have been stayed pending disposition of its petition to this Court.

In its Petition, Norwegian, refers to a federal case, *Fischlowitz v. Kloster Ltd.*, No. 95-2108-CIV-King (S.D. Fla.), as though it is, or was, part of the Action. Norwegian even attaches an order from *Fischlowitz* to the Petition (Appendix 3) in such a manner as to suggest that it is part of the case history of the Action. That is not correct. Nevertheless in *Fischlowitz*, Norwegian successfully argued that claims based on alleged misleading advertisements concerning port charges do *not* create federal admiralty jurisdiction. *See Defendant's Motion to Dismiss Plaintiffs' Amended Complaint* annexed hereto as Respondents' Appendix A. Norwegian's position abruptly changed after the interlocutory decision of the Third District certifying the Action as a class action under FDUPTA.

Despite Norwegian's dissatisfaction with the Third District's decision, that interlocutory decision does not create the jurisdictional basis for this Court's discretionary review.

REASONS FOR DENYING THE WRIT

I. This Court Lacks Jurisdiction to Review the Interlocutory Order That is the Basis for Norwegian's Petition

Norwegian asserts that jurisdiction is proper pursuant to 28 U.S.C. § 1257. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court identified four categories of cases which could be taken for review by treating the decision on the federal issue as a final judgment for purposes of satisfying the requirements of 28 U.S.C. § 1257, even though there were additional proceedings to be held in the state court. *Id.* at 477. This Action does not fit into any of the categories authorized by the *Cox* Court.

As a threshold matter, the Court cannot review federal question decisions made by state courts until judgment in the case is final. *Jefferson v. City of Tarrant*, 522 U.S. 75, 80 (1997). In *Jefferson*, the Alabama Supreme Court determined the federal law issue on an interlocutory appeal, then remanded the case for further proceedings. This Court held that it lacked jurisdiction over this non-final determination, noting that "[t]he outcome of those further proceedings could moot the federal question we agreed to decide. If the federal question does not become moot, petitioners will be free to seek our review when the state-court proceedings reach an end." *Id.* at 77-78. Likewise, in this Action, the Third District reversed a decision on class certification and remanded the matter to the trial court for further proceedings that could moot the issue Norwegian presents to this Court. The Florida Supreme Court unanimously chose not to review that decision.

As in *Jefferson*, the decision by the Third District was not a final judgment. There has been no trial on the merits or even a motion by Norwegian for summary judgment. Moreover, there has been no definitive resolution of the issue presented to this Court by the Florida Supreme Court, which simply chose not to review the decision of the intermediate court. Subsequent decisions by the trial court, however, will be subject to plenary appeal. Also similar to *Jefferson*, the court's decision affected only some of the counts in the complaint. Neither the trial court nor the Third District has issued a ruling on plaintiffs' unjust enrichment claim. Thus, as in *Jefferson*, the Action has not progressed to the point where the decision of the Third District is "an effective determination of the litigation." *Id.* at 81.

The *Jefferson* Court considered the four *Cox* categories and found that none applied. The same is true here.

The first category includes cases that have been essentially decided by the state court's ruling on the federal question. The Action clearly does not fit into this category.

The second category requires that "[n]othing that could happen in the course of the [further proceedings], short of settlement of the case, would foreclose or make unnecessary decision on the federal question." *Cox*, at 480. In addition, the further proceedings in the state court cannot "remotely give rise to a federal question . . . that may later come here." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 127 (1945). Review is precluded on both of these grounds. There are many issues which could arise in the trial court in its ultimate consideration of the merits of the Action, which could give rise to federal questions. In *Florida v. Thomas*, 532 U.S. 774 (2001) the Court concluded it did not have jurisdiction to review a decision of the Florida Supreme Court because, among other reasons, it could not assume that no additional federal questions would arise. *Id.* at 779.

The third category includes those cases where it would not be possible to review the federal issues whatever the ultimate outcome of the case. "[I]n these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." *Cox*, 420 U.S. at 481. This category generally applies to cases involving criminal or administrative law which do not allow for appeal or retrial of issues. None of the substantive issues in the Action have been decided on the merits. As the Court

in *Jefferson* held, once the case is completed, parties can seek review in the Supreme Court on any federal questions, even if the state court "adheres to its interlocutory ruling as 'law of the case.' " 522 U.S. at 82-83. This is so because the Supreme Court has "jurisdiction to consider all of the substantial federal questions determined in the earlier stages of [state proceedings], . . . and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case." *Hathorn v. Lovorn*, 457 U.S. 255, 261 (1982) (quoting *Reece v. Georgia*, 350 U.S. 85, 87 (1955)). Regardless of the outcome of the Action, at the conclusion of the state court proceedings, this Court could review any decision interpreting federal law. Thus, this Court lacks jurisdiction to review the Petition under the third category set forth in *Cox*.

The final category recognized in *Cox* includes cases where the federal issue has been finally decided and reversal on the federal issue

> would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue which itself has been finally determined by the state courts for purposes of the state litigation.

Cox, 420 U.S. at 780.

The Florida Supreme Court's denial of review did not constitute the end of the action on any claim, but merely the return of the Action to the trial court for further proceedings on the merits. On plenary appeal following adjudication on the merits, the Third District or the Florida Supreme Court could decide to consider the admiralty jurisdiction question, even if the instant decision is considered to be the law of the case. This is so because in Florida, "the law of the case doctrine is more flexible than res judicata in that it also provides that an appellate court has the power to reconsider and correct an erroneous ruling that has become the law of the case where a prior ruling would result in a 'manifest injustice.' " *Florida Dep't of Transp. v. Juliano*, 801 So.2d 101, 106 (Fla. 2001).

Moreover, the Third District's determination concerning the application of maritime law will not "seriously erode federal policy." Nor will it leave a "significant gap in the uniformity of federal maritime law" as Norwegian asserts. This Action is but one of many similar actions against cruise companies concerning the misleading nature of Port Charges. *See, e.g., Pickett v. Holland America Line-Westours, Inc.*, 35 P.3d 351 (2001); *Renaissance Cruises, Inc. v. Glassman*, 738 So.2d 436 (Fla. 4th DCA 1999). In most of these actions, the cruise lines asserted the applicability of admiralty law at some point during the litigation. In the *Holland* case, for instance, the trial court ruled in 1996 that maritime law did not govern the action, and the Washington appellate court denied review in 1997. *Pickett v. Holland America Line-Westours, Inc.*, No. 39791-5-1 (Wash. Ct. App. February 20, 1997). Respondents' Appendix B. In a case brought in federal court asserting admiralty jurisdiction in a claim brought under FDUPTA, the district court dismissed the action for lack of subject matter jurisdiction. *Sherman v. Royal Caribbean*

Cruises, Ltd., Case No.95-2058-CIV (S.C. Fla. 1995) ("mere fact that the alleged overcharge happens to be for a charge related to a maritime activity does not bring the matter within the ambit of federal admiralty jurisdiction"). Respondents' Appendix 3. Thus, if any "gap" exists, it is one that has been in place for a number of years with no discernable impact on or erosion of federal policy.

For all of the reasons set forth herein, this Court does not have jurisdiction to review the Action at this time and the Petition must be denied.

II. The Decision Below Presents No Question of Exceptional Importance

Rule 10(c) of the Rules of the Supreme Court of the United States provides that in order to obtain review of a state court decision, the court must have either (1) "decided an important question of federal law that has not been, but should be, settled by this Court," or, (2) "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Norwegian's Petition fails to qualify under either criterion.

Norwegian asserts that FDUPTA conflicts with traditional maritime law and therefore must be preempted. Norwegian cites to a small number of cases which have denied application of state deceptive practices statutes in determining the outcome of certain specific civil litigation. Petition at 8-9. However, there was no question in any of those cases that admiralty jurisdiction existed. For example, in *Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F.2d 577 (5th Cir. 1986), the dispute concerned liability for a fire which occurred on board a ship.

As a threshold matter, a court must first determine whether admiralty jurisdiction should apply at all. Norwegian omits this crucial step in asserting that maritime law preempts FDUPTA in this Action. Determinations of admiralty jurisdiction are reached utilizing the test set forth in *Grubart v. Great Lakes Dredge & Dock, Co.*, 513 U.S. 527 (1995). In order to apply admiralty jurisdiction to a tort claim, the party asserting jurisdiction must "satisfy conditions both of location and of connection with maritime activity." *Id.* at 534.

First there must be a determination of "whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." *Id.* In this Action, it is undisputed that Norwegian's deceptive and misleading actions occurred entirely on dry land. On this prong of the test alone, Norwegian's arguments must fail.

Norwegian also fails to meet the requirements of the connection test. The first element of this test requires the court to determine whether the action complained of has a "potentially disruptive impact on maritime commerce." *Id.* at 538. The conduct at issue here is the misleading and deceptive content of marketing and advertising materials Norwegian disseminated to the consuming public. The content of those materials has no disruptive impact on maritime commerce.

The second element of the connection test requires a determination that the activity giving rise to the claim "shows a substantial relationship to traditional maritime activity" *Id.* at 539.The content of marketing and advertising materials does not bear a substantial relationship to traditional maritime activity.

Therefore, under each aspect of the test set forth in *Grubart*, Norwegian fails to establish that admiralty jurisdiction is available. Without such jurisdiction, courts have refused to even reach the preemption question posed by Norwegian. *See, e.g., Certain Underwriters Subscribing to the Institute of London Underwriters Policy No. MB7092 A00 v. Apwel, Inc.*, 1991 WL 86117 (N.D. Ill. 1991).

In addition, even if the absence of admiralty jurisdiction were ignored, Norwegian's Petition must be denied. In *F/V Robins Nest, Inc. v. Atlantic Marine Diesel, Inc.*, 1994 WL 594592 (D.N.J. 1994) the court considered whether maritime law preempts the New Jersey Consumer Fraud Act. In so doing, the *Robins Nest* court reviewed the three-pronged test set forth in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) and reaffirmed in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994). Under this test a state law will not be preempted if it does not: (1) contravene the "essential purpose" of an act of Congress; (2) work material prejudice to the "characteristic features" of maritime law; or (3) interfere with the "proper harmony" of maritime law. *Robins Nest* at *2. *See also, In re Exxon Valdez*, 270 F.3d 1215, 1250-53 (9th Cir. 2001) (admiralty law does not preempt recovery under state law for economic injuries).

The court in *Robins Nest* concluded that the consumer fraud statute was not preempted even though the remedies provided under the statute were not available in admiralty. First, the statute did not contravene an act of Congress. Second, the statute was not a characteristic feature of admiralty because it did not originate in admiralty or have exclusive application there. *Robins Nest* at *3. Finally, the court balanced the state's interest in the law against the federal need for harmony and uniformity in federal law and concluded that the strong interest of the state in protecting consumers outweighed the need for uniformity.

This same conclusion was reached by the Third District in this Action. Thus, the decision by the Florida court does not conflict with any relevant decision of this Court or indeed any Circuit Court of Appeal, or even the highest court of any other state. Furthermore, to the extent that any important federal question is raised in this Action, it has already been settled by the application of the Court's prior decisions on admiralty jurisdiction and the tests required to determine whether or not a state statute, such as FDUPTA, should be preempted, all of which supports denial of the Petition.

CONCLUSION

For all of the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 95-2108-CIV-KING
MAGISTRATE JUDGE JOHNSON

ARLEN FISCHLOWITZ and PATRICIA FISCHLOWITZ, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

vs.

KLOSTER CRUISE LIMITED, a Bermuda corporation, d/b/a NORWEGIAN CRUISE LINE,

Defendants.

Defendant, Kloster Cruise Limited, d/b/a Norwegian Cruise Line, moves this court for an order pursuant to Federal Rule of Civil Procedure 12(b)(1) dismissing this case and in support thereof states:

1. This is a dispute involving Plaintiffs, Arlen Fischlowitz and Patricia Fischlowitz, passengers aboard a vessel owned by Kloster Cruise Limited. In their Amended Complaint, the Plaintiffs request injunctive relief in damages pursuant to Florida Statute 501.201, *Florida Deceptive and Unfair*

Trade Practices Act, for allegedly overcharging them for "port charges." Plaintiffs also claim entitlement to a class action based on the facts in their complaint.

2. Plaintiffs allege that jurisdiction is proper pursuant to 28 USC § 1333. Despite this allegation, there is no jurisdiction pursuant to 28 USC § 1333.

MEMORANDUM OF LAW

In the instant case, the Fischlowitz' allege a violation of a Florida state unfair trade practices statute. Their complaint pivots on claims of misrepresentation of "port charges" — Plaintiffs claim that Defendant advertised a port charge which was substantially lower than the port charge actually charged to the Defendant. Taking the allegations of the complaint as true, this court has no subject matter jurisdiction pursuant to 28 USC § 1333.

The seminal Supreme Court case concerning the reach of federal maritime tort jurisdiction is *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 US 249, 93 S.Ct. 493, 34 L.Ed.2d. 454 (1972). *Executive Jet* established the two-part "locality-plus-nexus" test for maritime tort jurisdiction. According to *Executive Jet*, the tort must have occurred on or over navigable waters, and the wrong alleged must "bear a significant relationship to a traditional maritime activity." Elaborating on the second part of the *Executive Jet* test, the Supreme Court listed four factors relative to a finding of "significant relationship to traditional maritime activity." These factors are (1) the functions and roles of the parties;

(2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and, (4) traditional concepts of the role of admiralty law. Because the Plaintiffs have met neither the locality nor the nexus parts of the *Executive Jet* test, this court may not exercise subject-matter jurisdiction here.

Case law illustrates the parameters of admiralty jurisdiction. In *Gaspard v. Amarata Hess Corp.*, 13 F.3d 165 (5th Cir. 1994), the Fifth Circuit held that a painter's helper injured while trying to board a barge, was not engaged in particularly maritime activity at the time of his injury to support exercise of admiralty jurisdiction because the injury was not meaning-fully different from a slip and fall injury occurring wholly on land. Similarly, in *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984) the Eleventh Circuit found that there was no admiralty jurisdiction in cases where negligent acts and omissions alleged by ship repair workers against manufacturers and distributors of asbestos products were the exposure was land-based. *See Hollister v. Luke Const. Co.*, 517 F.2d 920, 921 (5th Cir. 1975) (nexus requirement was not met where welder was injured while working on a floating, but still incomplete hull, because vessel construction is not a maritime activity.) *See also Lamontagne v. Craig*, 632 F.Supp. 706, 709 (N.D.Cal. 1986) (admiralty jurisdiction does not extend to defamatory liable where, although written at sea, publication and corresponding injury occurred on land), *aff'd.*, 817 F.2d 556 (9th Cir. 1987); *Clinton v. Joshua Hendy Corp.*, 285 F.2d 199, 201-02 (9th Cir. 1960) (admiralty jurisdiction does not extend to tortious interference with contractual relations consummated on land.)

This alleged tort occurred on land and thus, fails the first prong of the *Executive Jet* test — "location" — of admiralty jurisdiction. Even if Plaintiffs fulfilled the "location" prong of the *Executive Jet* test, none of the four criteria relative to a finding of a significant relationship to traditional maritime activity exists here. There is nothing uniquely maritime about a misleading advertisement; it is not meaningfully different from any land-based misrepresentation. Admiralty law has never traditionally concerned itself with protecting the rights of citizens who find advertising to be misleading. The mere fact that the alleged overcharge happens to be for a charge related to a maritime activity does not bring the matter within the ambit of federal admiralty jurisdiction. *See, e.g., E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660, 662 (11th Cir. 1987). In short, this case is not a uniquely maritime case and Plaintiffs cannot fulfill the second part of the *Executive Jet* test — nexus to maritime activity.

Pursuant to Local Rule 3.9(D), Defendant brings to the attention of this court the order of dismissal in the case of *Drs. Alan and Carol Sherman v. Royal Caribbean Cruises, Ltd.*, Case No. 95-02058, United States District Court, Southern District, attached as Exhibit "A" in which the district court dismissed for lack of subject matter jurisdiction plaintiffs' complaint brought under the Florida Deceptive and Unfair Trade Practices Act allege in which plaintiffs allege that defendant Royal Caribbean Cruises overcharged plaintiffs for port charges.

Appendix A

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APPENDIX B — ORDER OF THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE DENYING MOTION FOR DISCRETIONARY REVIEW DATED FEBRUARY 20, 1997

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

No. 39791-5-I

COMMISSIONER'S RULING
DENYING DISCRETIONARY REVIEW

FRANCINE PICKETT, BRIAN COHEN, JACK MASIN, BELLE MASIN, RICHARD TUMPOWSKI, and RUTH TUMPOWSKI, individually and on behalf of all others similarly situated,

Respondent,

v.

HOLLAND AMERICA LINE — WESTOURS, INC.,

Petitioner.

Holland America seeks discretionary review of the superior court order denying Holland America's motion for summary judgment dismissal of the claims of all but one plaintiff. Because Holland America fails to establish that the court's ruling affects the status quo, the motion for discretionary review is denied.

Appendix B

FACTS

Plaintiffs are residents of New York, California and Florida who took Caribbean cruises on Holland America. They have filed suit against Holland America, challenging the amounts it charged for "port charges and taxes." The plaintiffs allege a violation of the Washington Consumer Protection Act, negligent misrepresentation and unjust enrichment.

Each plaintiff-passenger received a contract before taking the cruise. The contracts contain limitation periods: a 30-day period within which to give notice of a claim and a 180-day period of repose. The contracts also contain the following choice of law provision:

> This contract is issued at Seattle, Washington. As to Cruises and as to the Ship segment of your Cruisetour, it will be construed in accordance with the general maritime law of the United States. As to the non-Ship segment of your Cruisetour, it will be construed in accordance with the laws of the State of Washington, U.S.A.

According to Holland America, a cruise involves travel entirely by ship, visiting only ports of call, while a cruisetour includes a land tour as well as a cruise.

Only one plaintiff, Francine Pickett, complied with these contractual limitations. Based on the other plaintiffs' failure to comply with the contractual limitations periods, Holland America moved for summary judgment dismissal.

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The parties submitted extensive briefing and presented full argument. The court denied Holland America's motion for summary judgment, ruling:

> The court finds the gravamen of plaintiff[s'] claim is the alleged unfair and deceptive conduct which induced plaintiffs to enter into a contract. The alleged conduct did not concern the cruise or ship segment of the cruisetour and is therefore not governed by maritime law. Rather, the alleged conduct is governed by the law of Washington. Under Washington law, the time limits in the cruise contracts would not be strictly enforceable because the plaintiff must have an opportunity to reasonably discover the elements of his cause of action. The factual record is not sufficiently clear to determine whether plaintiffs knew or reasonably should have known what the port charges and taxes were.

Holland America moved for reconsideration, arguing that federal maritime law would govern enforcement of the contractual limits on the right to sue, even if Washington law would govern the "alleged conduct." The court denied the motion.

Holland America now seeks discretionary review.

Appendix B

CRITERIA

This court will grant interlocutory review of a superior court order only:

> (1) If the superior court has committed an obvious error which would render further proceedings useless; or
>
> (2) If the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act; or
>
> (3) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court.

RAP 2.3(b).

DECISION

The trial court reasoned that Washington law applied because the conduct that forms the basis of the lawsuit occurred on land, before the plaintiff-passengers began their cruises. Holland America challenges the court's ruling because the contract states that Washington law applies in only one situation: the non-ship segment of a cruisetour. Because the plaintiffs took cruises, not cruisetours, and Holland America argues the court committed obvious error by refusing to apply federal maritime law.

Appendix B

Holland America further argues that under federal maritime law, the contractual limitations periods are enforceable and therefore the trial court committed obvious error by refusing to enforce them. It cites numerous cases that set forth the maritime law standards for determining whether such limitations are enforceable.

The plaintiffs defend the court's ruling. They argue that their action boils down to a claim of false advertising and that Holland America fails to demonstrate that such a claim is covered by the contract. In addition, they argue that even under federal maritime law, the court properly refused to enforce the contractual limitations period. Like Holland America, they cite numerous cases supporting their arguments.

Given the absence of directly controlling authority, and supporting authority cited by both sides, it is difficult to say the trial court committed obvious or probable error. However, this question need not be definitely resolved because Holland America cannot show that the court's ruling affects the status quo.

Even if the court had granted Holland America's motion for summary judgment, Francine Pickett's case would have survived because she complied with the contractual limitations periods. Given that her case would proceed, the court's refusal to dismiss the other plaintiffs' claims does not affect the status quo. In addition, questions regarding certification of this case as a class action are yet to be determined. If the court decides to certify the class, then

Appendix B

Pickett's timely filing satisfies the contractual limitations for all other plaintiffs, as demonstrated in *Yollin v. Holland America Cruises, Inc.*, 97 A.2d 720 (1983).

In that case, Yollin filed an action of behalf of himself and 904 other passengers who booked a Caribbean cruise with Holland America. The complaint pleaded several causes of action, including fraud, breach of contract, negligence and false advertising. Only Yollin complied with the contractual limitations for suing Holland America. The lower court held that the other passengers were time-barred and therefore precluded from class membership. The appellate court disagreed, holding that timely commencement by Yollin "satisfied the purpose of the contractual limitation period as to all persons who might subsequently participate in the suit as members of a class." *Yollin*, 97 A.2d at 875.

For all these reasons, Holland America fails to carry its heavy burden that the criteria of RAP 2.3(b) have been satisfied.

Now, therefore, it is hereby

ORDERED that the motion for discretionary review is denied.

Done this 20th day of February, 1997.

s/ Paris K. Kallas
Court Commissioner

APPENDIX C — ORDER OF DISMISSAL OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA DATED NOVEMBER 23, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-2058-CIV-UNGARO-BENAGES

DRS. ALAN and CAROL SHERMAN, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

vs.

ROYAL CARIBBEAN CRUISES, LTD.,

Defendants.

ORDER OF DISMISSAL

THIS CAUSE came before the Court upon Plaintiffs' Motion to Amend Complaint filed October 17, 1995.

THIS COURT has reviewed the file an the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby,

ORDERED and ADJUDGED that Plaintiffs' Motion to Amend is DENIED and this Cause is DISMISSED due to lack of subject matter jurisdiction. Plaintiffs state that jurisdiction is proper pursuant to 28 U.S.C. § 1333. However, this Court finds that jurisdiction is not proper in this Court

because Plaintiffs' cause of action is not a "civil case of admiralty or maritime jurisdiction," and Plaintiffs have not asserted any other grounds for federal jurisdiction.

Federal courts possess jurisdiction over admiralty claims to further the important national interest in establishing a uniform body of maritime law. *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523, 1528 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). As a result, federal courts possess admiralty jurisdiction over claims having a significant relationship to traditional maritime activity. *See Guidry v. Durkin*, 834 F.2d 1465 (9th Cir. 1987). Federal courts tend to exercise admiralty jurisdiction restrictively because its use invokes substantive maritime law which may tend to preempt state regulation of matters traditionally within ambit of local control. *Oman v. Johns-Manville Corp.*, 764 F.2d 224 (4th Cir. 1985), *cert. denied*, 474 U.S. 970. In the case at bar, Plaintiffs' claim is brought under the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, alleging that Defendants overcharged them for port charges when selling packages for travel on Defendants' cruise line. The Court finds that the mere fact that the alleged overcharge happens to be for a charge related to a maritime activity does not bring the matter within the ambit of federal admiralty jurisdiction. *See, e.g., E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660, 662 (11th Cir. 1987) ("The mere fact a contract has some reference to a maritime matter . . . is not sufficient to bring it within admiralty jurisdiction.")

Plaintiffs'claim is brought under the Florida Deceptive and Unfair Trade Practices Act and is entirely a matter of state jurisdiction. Accordingly, it is hereby

Appendix C

ORDERED AND ADJUDGED that Plaintiffs' Amended Complaint is DISMISSED due to lack of subject matter jurisdiction.

DONE AND ORDERED in Chambers at the United States District Courthouse in Miami, Florida, this 23 day of November, 1995.

s/ Ursula Ungaro-Benages
Ursula Ungaro-Benages
UNITED STATES DISTRICT JUDGE